1967

State of Utah v. Kent Kirkman : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

KENT M. KIRKMAN,
Defendant-Appellant.

Case No. 10783

BRIEF OF RESPONDENT

Appeal from the Judgment of the Second Judicial District Court in and for Davis County, Honorable Parley E. Norseth, Judge

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PRINTED BY SALT LAKE TIMES

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

Appellant appeals his conviction for burglary in the second degree.

DISPOSITION IN LOWER COURT

Appellant was charged by information with the crime of burglary in the second degree. Jury was had in the Second Judicial District Court in and for the County of Davis, State of Utah, on September 20, 1966. The jury

returned a verdict of guilty as charged, and the Honorable Parley E. Norseth, judge, imposed sentence upon the appellant of confinement for the indeterminate period provided by law.

RELIEF SOUGHT ON APPEAL

Respondent submits that the conviction should be affirmed.

STATEMENT OF FACTS

Respondent is in agreement with appellant's statement of facts with the addition and clarification of these following particulars: Prior to the time when Officer Ehlers arrived on the scene, John Dinse and his wife, Laola Dinse, had observed the truck which the defendants occupied, pull into the driveway of their business establishment directly across the street from the Bountiful City Water Shops (Tr. 52, 25). They then observed the truck back out of the driveway and proceed north up the street past the Bountiful City Water Shops (Tr. 39, 52). They further observed the truck to drive up and down the street two or three times with the headlights off (Tr. 53, 30). Laola Dinse next observed the truck drive up and over the curb and park very near to the Bountiful City Water Shops (Tr. 53). Laola Dinse made the additional observation that the defendants seemed to be hooking something with a chain and trying to drag it. (Tr. 32).

The facts of appellant's brief correctly state that a window leading into the rest room of the Bountiful City Water Shops was found open. However, it is significant that through said rest room, entrance may be gained to the main parking area wherein truck No. 3 owned by the Bountiful City Water Company was parked on the evening of April 5, 1966 (Tr. 63). A wrench properly identified in the evidence as that belonging in the tool compartment of truck No. 3 was found in the front seat of the truck occupied by the defendant on the evening of April 5, 1966 (Tr. 39).

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF BURGLARY IN THE SECOND DEGREE.

Appellant has been convicted of burglary in the second degree. The elements of said crime are stated in Utah Code Ann. § 76-9-3 (1953). The statute, in part, provides:

> Every person who, in the nighttime, enters an open door, window, or other apertureof any house . . . or other building . . . with intent to commit larcency or any felony, is guilty of burglary in the second degree.

Thus it is clear that the State need put on sufficient evidence only to prove these things: That the

accused entered a building; that the accused entered during the nighttime; that the accused entered with the intent to commit a felony. Respondent submits that the evidence clearly shows sufficient facts from which the jury could reasonably find that all of the elements of the crime were present.

It is clear from the direct evidence in this case that appellant and another, not involved in this prosecution, drove by the Bountiful City Water Sheds a number of times with their lights off. Apparently they were "casing" the building upon which they had designs. After a number of times up and down the street, they decided that the coast was clear, drove up and over the curb, and parked the truck next to a window in the Bountiful City Water Sheds. The men then got out of the truck. There follows a period of perhaps ten minutes wherein there is no direct evidence as to the activities of the defendant. However, they were next observed by both Mrs. Dinse and Officer Ehlers to be standing outside of the truck. Also, Officer Ehlers observed a wrench belonging to the Bountiful City Water Company in the front seat of the truck occupied by defendant. This wrench was supposed to be *not* in the seat of defendant's truck, but in the tool compartment of the truck owned by the Bountiful City Water Company, which truck was at the time inside the building in question. The way to the parking area where the truck was kept was readily accessible through the open window in the building. However, it can be reasonably inferred that since the

defendant and his companion were working on the outside gate at the time they were apprehended, that they not only wanted to get themselves inside the building, which they could do and the jury believed they had done via the window access route, but they also wanted to get their truck inside the gate and inside the building. For this they came well prepared. They had bolt cutters, crow bar, and a pry bar in the back of the truck. Some of these tools were being used at the time they were apprehended or had been used immediately preceding their apprenhension in an attempt to open the gate through which their truck could be admitted.

Respondent agrees with appellant that the most damaging evidence adduced in this case was the wrench belonging to the Bountiful City Water Company and found in possession of appellant. This evidence gives rise to the strong inference that appellant did, in fact, enter the building and would suffice to supply the necessary element of entry. As was stated in *State v. Kazda,* 15 Utah 2d 313, 315, 392 P.2d 486, 488 (1964) "The jury can find not only the facts shown directly by the evidence, but also such additional facts as may reasonably be inferred therefrom." Thus, that the building was entered would hardly admit of argument.

It is submitted that the foregoing detailed circumstances would also suffice to allow the jury to return a finding which would include a determination that the defendant intended to commit a felony inside the

building. As was said in *State v. Hopkins,* 11 Utah 2d 363, 365, 359 P.2d 486, 488, (1961):

> It is to be remembered that intent, being a state of mind, is rarely susceptible of direct proof. But it can be inferred from conduct and attendant circumstances in the light of human behavior and experience. It is upon that basis that authorities uniformly affirm that where one breaks and enters into the dwelling of another in the nighttime, without the latter's consent, an inference may be drawn that he did so to commit larceny.

When the facts have been properly presented to the jury, great weight is given to the properiety of the verdict returned thereon. Thus, when the jury finds the fact as such and there is a reasonable basis from which they can draw the requisite inferences, the decision will stand. *State v. Tellay,* 7 Utah 2d 308, 324 P.2d 490 (1958); *State v. Sullivan,* 6 Utah 2d 110, 307 P.2d 212 (1957), cert. den.; *Sullivan v. Utah,* 355 U.S. 848 (1957). Thus it is clear that from the foregoing circumstances, the jury was entirely within its prerogative to find the facts and return a verdict of guilty thereon.

Moreover, that the presence of the wrench in the truck was strongly inferential of what had taken place can hardly be disputed. Some jurisdictions will convict on that evidence alone; that is, the unexplained possession of stolen property alone is sufficient to convict in certain instances. *Rueda v. People,* 141 Colo. 504,

348 P.2d 958 (1960); *Davis v. People,* 137 Colo. 113, 321 P.2d 1103 (1958). However, the rule that is adopted in most of our sister states, and which apparently is prevailing in Utah, is that the unexplained possession of articles recently stolen coupled with other incriminating circumstances, will be sufficient to support the jury's verdict of guilty. *State v. Washington,* 13 Utah 2d 92, 368 P.2d 709 (1962); *People v. Conerly,* 172 C.A.2d 682, 342 P.2d 305 (1959), cert. den., 362 U.S. 924 (1959); *State v. Andrade,* 83 Ariz. 356, 321 P.2d 1021 (1958); *State v. Thomas,* 121 Utah 639, 244 P.2d 653 (1952); *State v. Deeds,* 126 Mont. 38, 243 P.2d 314 (1952); *Rogers v. State,* 85 Okla. Crim. 116, 185 P.2d 927 (1947).

As was said in *State v. Thomas, supra,* at 641, 244 P.2d 654:

> We recognize the correctness of the defendant's assertion that mere possession of recently stolen property, if not coupled with other inculpatory or incriminating circumstances would not justify submission of the case to the jury and would not be sufficient to support a conviction. . . . Conversely, however, possession of articles recently stolen, when coupled with circumstances inconsistent with innocense, . . . may be sufficient to connect the possessor with the offense of burglary and justify his conviction of it.

Respondent submits that such is the case with the facts as shown by the record herein. There is direct

evidence that the defendant had in his possession property rightfully belonging to the Bountiful City Water Department. There is additional evidence strongly tending to show incriminating and inculpatory action on the part of the defendant on the night in question. In light of these facts clearly established by the record, respondent submits that the jury had adequate evidence to consider, and its findings of guilty were properly supported.

POINT II.

THE INSTRUCTIONS TO THE JURY WERE PROPER AND ADEQUATE IN THE PREMISES SINCE:

A. THE INSTRUCTIONS REQUESTED AND GIVEN PROPERLY INCLUDED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME.

B. THE COURT DID NOT ERR IN FAILING TO GIVE AN INSTRUCTION WHICH WAS NOT REQUESTED.

C. THE DOCTRINE OF RECENT POSSESSION IS A STATUTORY DOCTRINE CONCERNED WITH THE PROSECUTION FOR LARCENY, NOT SECOND DEGREE BURGLARY.

A. It is a well settled rule that the instructions are to be considered together as a whole, and are not

to be taken independently or singularly. In fact, the court in this case did so instruct (Tr. 90). With this in mind, it is clearly apparent that all of the elements of the offense were properly placed before the jury via the instructions. Instruction No. 1 puts forth all of the essential elements upon which the jury must decide to make a conviction in this case (Tr 84). Instruction No. 2 is an admonition to the jury that Instruction No. 1 is not a statement of facts but is a statement of what must be found by the jury in order to make a conviction. (Tr. 84). Instruction No. 3 clearly would tell the jury that they must find sufficient evidence to prove each of the essential allegations incorporated by the first two instructions (Tr. 85). And then Instruction No. 4 clearly charges the jury to find beyond a reasonable doubt that all of the facts alleged in Instruction No. 1 did exist in this case (Tr. 85).

Thus, when all of the instructions given in this case are taken as a whole, it becomes clearly apparent that the jury had before them the charge of finding the necessary elements of the crime. Further, in returning a verdict of guilty as charged, the jury satisfactorily considered each and all of the essential ellegations.

B. This court has held that unless a party requests instruction on special matters he cannot predicate error on the court's failure to charge. *State v. Rowley,* 15 Utah 2d 4, 386 P.2d 126 (1963). Defendant did

not request an instruction on recent possession at the trial. Nor was there any objection made to the failure to so instruct at the trial. Appellant admits in his brief that the instruction was not requested by defendant (Brief of Appellant, page 13). Respondent submits that the defendant cannot now complain to this court that the failure was prejudicial to him. Yet appellant would urge that it is the court's duty to make instructions that are not requested by either side. By this unique argument, defense counsel could in many instances assure themselves of a reversal on appeal merely by failing to request a necessary instruction hoping that the court might overlook the instruction and fail to give it. Respondent submits that this method, which would allow the defendant by his own doing to set himself up an almost assured reversal on appeal, is wholly inconsistent with our system of justice. It is submitted that our system of justice will not tolerate a defendant purposely planting a flaw at trial in the hope of gaining a reversal on appeal.

Had defendant, at trial, requested an instruction on recent possession, and the court refused to give such an instruction, the case would be different. Under the facts here, however, the appellant should not be allowed to profit from his own wrong doing. Thus, the failure to give such an instruction in no way prejudiced appellant.

C. Appellant urges that the doctrine of recent possession is a material element in the crime of second

degree burglary and cites Utah Code Ann. § 76-33-1 (1953), as authority for such statement. The respondent submits that appellant misconstrues this section. The section above referenced refers to larceny prosecutions. Had appellant been charged with larceny, a failure to instruct on all of the statutory elements of larceny may indeed have been prejudicial. However, we are here concerned with a conviction on the charge of second degree burglary. Respondent does not deny that the possession of the recently stolen property by defendant was considered by the jury. Indeed, strong inferences arise from such possession, and these were properly considered by the jury under the instructions given.

CONCLUSION

Respondent submits that the jury were properly presented with the necessary facts to support the conviction of burglary in the second degree. It is submitted that the jury's determination of the facts presented, and the inferences reasonably drawn therefrom should not be disturbed on appeal. This court need only examine the record to see if there was sufficient evidence from which the jury could reasonably conclude as they did. Respondent submits that there is such sufficient evidence.

Respondent further submits that the jury were properly instructed on the law as it applies to this case. Viewing the instructions as a whole, they are clear,

concise, and complete and the jury being properly instructed returned a verdict which clearly substantiates that they were satisfied that all of the necessary elements of the crime were present. Respondent urges that in view of this record and the facts found by the jury, this court should affirm the conviction.

Respectfully submitted,

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